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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TERRY BLANKENBAKER et al.,

Plaintiffs and Appellants,

v.

JANET KAYE INGRAM,

Defendant and Appellant;

STATE OF CALIFORNIA,

Defendant and Respondent.

E045277

(Super.Ct.No. BCV3271)

OPINION

APPEAL from the Superior Court of San Bernardino County. Martin A. Hildreth, Judge. (Retired judge of the San Bernardino Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

McClagherty and Associates, Jay S. McClagherty and Christian E. Sanne for Plaintiffs and Appellants.

Kinkle, Rodiger & Spriggs, Scott B. Spriggs and Michael F. Moon for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, James M. Humes, Chief Assistant Attorney General, James M. Schiavenza, Assistant Attorney General, and Joel A. Davis, Deputy Attorney General, for Defendant and Respondent.

This action is an appeal from a wrongful death/personal injury lawsuit that resulted from a fatal rear-end collision on Interstate 40 (I-40) near Newberry Springs. On April 4, 1997, plaintiff Terry Blankenbaker and his wife Norma¹ were driving with their friends, plaintiffs Raymond “Ed” and Denise Shipley (the Shipleys), eastbound on I-40 between Barstow and Needles on their way to Laughlin. Blankenbaker came over a hill and noticed that the cars in front of him had their brake lights illuminated, a tractor-trailer had its flashers activated, and there was a flashing yellow light nearby (which was later determined to be an accident between a tour bus and a car). As Blankenbaker slowed to approximately five miles per hour and came up behind the tractor-trailer, his car was suddenly enveloped in a cloud of dust and sand. Blankenbaker pumped his brakes several times in order to warn drivers behind him.

At the same time, Ingram was driving behind Blankenbaker with her friend Janet Jarrett (Jarrett).² They were on their way home after a whirlwind driving trip from Oklahoma to San Diego. Ingram never saw the lights that Blankenbaker observed.

¹ Although there were several Blankenbakery who sued the State of California and defendant and appellant Janet Kaye Ingram (Ingram) (they were Terry and Norma Blankenbaker’s children), essentially the only evidence presented involved Terry and Norma. Hence, we will refer to Terry as Blankenbaker and Norma Blankenbaker as Norma.

² Jarrett has not filed an appeal in this case.

Suddenly Ingram's car entered the dust storm that had drifted across the road. She immediately impacted the car containing Blankenbaker, Norma, and the Shipleys. Norma was killed in the accident. Blankenbaker, the Shipleys, Ingram, and Jarrett all suffered injuries.

Blankenbaker and his children, along with the Shipleys, filed a complaint against Ingram for negligence, wrongful death, and negligent infliction of emotional distress. The complaint was later amended to add the State of California as the California Highway Patrol (CHP), hereinafter the State,³ as a defendant on a theory of dangerous condition of public property. The State filed a cross-complaint against Ingram for indemnity and declaratory relief. Ingram and Jarrett both filed complaints against the State. After a jury trial, the jury found the State had zero liability for the accident and found for the Blankenbakers and the State against Ingram, who was found to have 100 percent liability.

Ingram makes the following claims on appeal:

1. Counsel for the State made prejudicial and improper statements during closing argument regarding the taxpayers paying for the judgment if the State was found liable.
2. Counsel for the State improperly referenced the liability of Caltrans in closing argument even though it had prevailed on a motion for summary judgment prior to trial.

³ The complaint was originally filed against the CHP and the California Department of Transportation (Caltrans), but Caltrans prevailed on their motion for summary judgment prior to trial.

3. The jury's verdict was inconsistent with the evidence, as the evidence established that the State had adequate notice of the dangerous condition to support a verdict against it.

4. The special verdict form provided to the jury provided for an inconsistent verdict.

5. The trial court erred by excluding certain testimony from Ingram's expert.

The Blankenbakers and Shipleys claim on appeal as follows:

1. The State's counsel improperly referenced taxpayer liability during closing argument.

2. The trial court abused its discretion by allowing the State to be given two arguments to the jury at the close of evidence.

3. The failure of the jury to award noneconomic damages to Blankenbaker requires reversal.

We find no reversible error.

I

PROCEDURAL BACKGROUND

On August 26, 1999, the Blankenbakers and Shipleys filed the complaint at issue here, their sixth amended complaint (Complaint), against Ingram, the State, Caltrans, and CHP Officers Lance Higgins and Steve Mann. The Complaint alleged negligence against Ingram. It also alleged against the State and Caltrans a dangerous condition of public property under Government Code section 835. It further alleged wrongful death and

negligent infliction of emotional distress against all defendants. It also alleged that CHP Officers Higgins and Mann were grossly negligent.

Ingram and Jarrett also filed complaints against the State alleging causes of action for dangerous condition of public property and gross negligence. The State filed a cross-complaint against Ingram for indemnity and apportionment of fault.⁴

On December 17, 1999, the trial court granted the summary judgment motion of the State, Caltrans, and CHP Officers Higgins and Mann on the ground of immunity under Government Code sections 815.2 and 820.2. We reversed the trial court's ruling on the summary judgment in part in *Blankenbaker v. State* (May 7, 2001, E026830) (nonpub. opn.), allowing the case to proceed against the State, but granted dismissal as to Caltrans.⁵ At some point, the parties dismissed their case against CHP Officers Higgins and Mann, but the parties have not included that information in the record.

A first trial in this matter was held. The jury found the State 100 percent at fault for the accident and found that Ingram had no fault for the accident. Total damages were awarded to plaintiffs against the State in the amount of \$4,655,396.22. This court reversed the judgment, finding that the trial court erroneously excluded the State's evidence. The second trial commenced on April 9, 2007.

⁴ We take judicial notice on our own motion of the nonpublished opinion in the prior case (*Blankenbaker v. Ingram* (Jan. 10, 2005, E033930)) as the instant record does not contain the complaints filed against the State.

⁵ We also take judicial notice on our own motion of the nonpublished decision in the prior case. (*Blankenbaker v. State* (Dec. 28, 2001, E028961).)

On October 16, 2007, the jury returned their special verdict finding Ingram 100 percent at fault for the accident; the State was found to have no liability. The jury awarded Blankenbaker and his family \$1,292,128 for the wrongful death of Norma. Blankenbaker was awarded \$4,200 in economic damages for his injuries and no pain and suffering damages.⁶ The Shipleys were awarded a combined economic and noneconomic award for injuries to both of them in the amount of \$909,874.

On November 20, 2007, a motion for new trial was filed by the Blankenbakers and Shipleys, raising many of the same issues raised on appeal. Ingram also filed a motion for new trial (raising the same issues as on appeal) and joined in the Shipleys' and the Blankenbakers' motion. Ingram also asked for judgment notwithstanding the verdict (JNOV).

The motions for new trial were denied on January 3, 2008. JNOV was granted, in part, to strike the award of monetary damages to Ingram and Jarrett.

Ingram, the Blankenbakers, and the Shipleys all appealed.

⁶ The jury found damages in the amount of \$12,100 for Ingram despite finding her 100 percent at fault. The jury also found damages suffered by Jarrett in the amount of \$78,500 even though she did not sue Ingram.

II

FACTUAL BACKGROUND⁷

A. *Reports of Inclement Weather Prior to the Accident*

On April 4, 1997, Victoria Graham was working as a dispatcher in the Barstow CHP communications center, which was located 20 miles from Newberry Springs. About 12:30 p.m., CHP officers in the field and weather advisories reported strong gusty winds on I-40 and in the entire San Bernardino County.

At 2:55 p.m., Graham called Daggett Airport (which was seven to nine miles from the accident site) in Newberry Springs to find out if airplanes were leaving from the area that day. She was told by another CHP officer that he could not see the runway because of the wind and blowing dust.⁸ Graham replied that it was like a hurricane outside in Barstow.

At 5:29 p.m., Graham was notified that there was one foot of sand on Minneola Road, which was between Interstate 15 (I-15) and I-40, closer to I-15 but near Newberry Springs.

David Marcy was employed as a weather observer at Daggett Airport on that day. He started at 4:00 p.m. and claimed he could see on at least nine occasions that there was dust blowing over I-40 near the airport. There were reports of blowing sand beginning at

⁷ We draw the statement of facts from the trial testimony, which included witnesses called by Ingram, the Blankenbakers, the Shipleys, and the State.

⁸ The jury heard an audiotape of the conversation, but it was not transcribed or transmitted to this court.

12:54 p.m. that day, but no reports of loss of visibility. At 3:00 p.m., maximum gusts of wind at the airport were 44 miles per hour.

A National Weather Service (NWS) bulletin was issued at 4:45 p.m. It cited “sharply reduced visibility due to windblown dust” on the “I-15 corridor,” which included I-15 from Cajon Pass to Las Vegas. It did not reference I-40 or Newberry Springs where the accident occurred. There was no evidence that the CHP actually received the notice. CHP policy did require dispatchers to advise officers of NWS bulletins.

CHP Officer Ted Montez was assigned to the Barstow station at the time of the accident. At 4:00 p.m., he drove on I-40 in the area where the accident occurred. There may have been dust blowing across the road, but there were no visibility problems.

Several calls involving wind conditions were responded to by the CHP prior to the first accident, including a sign and a tree that had fallen down, but these incidents occurred 30 miles from the accident.

At 7:00 p.m., a motorist contacted the CHP and reported wind and dust on I-40 near Newberry Springs.

B. *First Accident on I-40*

Just before 7:00 p.m., Neil Yeager was driving 65 miles per hour on eastbound I-40 near Newberry Springs. It was windy, but clear. Suddenly, he encountered poor visibility due to a dust storm; it was like a curtain went down in front of him. Yeager slowed down but was immediately rear-ended by a tour bus. Yeager believed the dust

storm caused the accident. Paramedics who treated Yeager told him I-40 should have been closed prior to his accident.

Another driver who was in the vicinity of the first accident indicated that he was eastbound on I-40 when he was suddenly encapsulated in a dust storm. It had been clear right up until the dust storm. Visibility returned after the dust storm.

At 6:56 p.m., CHP Officers Higgins and Mann were dispatched to the scene of the first accident. As Officers Higgins and Mann drove to the scene on eastbound I-40 from Barstow it was clear. They first noticed dust blowing across the road starting about one mile prior to the accident scene, around the off-ramp for National Trails Highway. They arrived at the accident scene about 7:20 p.m. Visibility ranged from 50 to 200 feet and was at zero at times.

Officer Higgins immediately called for a supervisor to respond so that additional units could be directed to help because of low visibility, which he described as between zero and 30 feet. Officer Higgins recommended escorts.

Officers Higgins and Mann cleared the accident scene. Yeager was transported to the hospital, and his car was moved out of the view of traffic. There were no serious injuries of the persons on the tour bus, so it departed the scene about 7:42 p.m. Officer Higgins called for a tow truck at 7:29 p.m. Officer Higgins was advised that Sergeant Paul Schroeder and another unit were en route.

While waiting for back-up, Officer Higgins put on goggles and stood outside the patrol car smoking a cigarette. Officer Mann was in the car filling out an accident report.

Traffic was flowing at an appropriate speed for the dust storm conditions, and Officer Higgins did not hear any screeching brakes or honking horns. At least 200 vehicles passed by without incident. Officer Mann believed he could not leave the scene because he was waiting for a tow truck for Yeager's vehicle.

Officer Higgins felt it would be unsafe to try to execute a traffic break at the head of the dust storm on eastbound I-40 with only one patrol car. He felt that he needed to wait for Sergeant Schroeder, who was about 20 miles from the scene. Officer Higgins felt that they would then start escorting traffic through the area once Sergeant Schroeder arrived. Officer Higgins considered using cut throughs (these were breaks between the eastbound and westbound I-40 lanes that could be utilized to cross over the median) but felt it was too dangerous because of visibility. Further, Officer Higgins believed that diverting traffic to the National Trails Highway (which ran parallel to I-40) would present the same visibility problems.

Sergeant Paul Schroeder was in charge of the area in Newberry Springs that night. When he got the call from Officer Higgins, he stopped what he was doing and immediately responded to the scene, believing he would provide escorts. This was the first time that Sergeant Schroeder was aware of the visibility problems on I-40. As he approached where he thought the bus accident had occurred, he encountered severely restricted visibility because of blowing sand. There were no visibility problems up to that

point. Visibility only got as low as 20 feet, but Sergeant Schroeder thought it was an unsafe driving condition.⁹

Officer Mann testified at trial that the situation required that something should be done to either detour traffic or warn motorists and that he felt Officer Higgins was accomplishing that.¹⁰ Officer Mann had closed I-40 in a little over 10 minutes by himself due to a fire that involved chemicals near the freeway in July 1998. However, it took some time to get into position prior to closing the freeway.

Several fire department personnel and paramedics responded to the first accident, including Robert Springer, a fire captain for the volunteer Newberry Springs Fire Department. While responding, he encountered severely limited visibility from blowing dust on National Trails Highway. He could not see the lines on the freeway. Springer lived in Newberry Springs and claimed that brownouts (blowing dust and wind that obscured sight) had started at his house around noon. The brownouts were unpredictable. Springer indicated that the visibility at the tour bus accident varied from zero to 200 feet.

Springer asked Officer Higgins at the scene if he was closing the road and was told by Officer Higgins that it was not his decision but rather had to be made by a sergeant.

⁹ During the first trial, Sergeant Schroeder testified there was zero visibility. He explained he was being more literal here, as he could see his hand in front of his face.

¹⁰ At the first trial, Officer Mann only stated that something should be done about the visibility problem.

Other fire personnel and paramedics who arrived at the first accident scene estimated the winds were blowing between 50 to 80 miles per hour and that visibility was zero at times. One of the ambulance drivers safely used a cut through to cross the highway in order to take Yeager to the hospital.

C. *The Instant Accident*

About 7:51 p.m., Blankenbaker was driving eastbound on I-40 just where the National Trails Highway went over the freeway.¹¹ Blankenbaker was driving, and Ed Shipley was in the front seat. Norma was in the backseat with Denise Shipley. They were on their way to Laughlin.

Blankenbaker, Ed, and Denise all indicated that the night was clear, but dark, as they were driving. There was no noticeable wind. As they went over a crest in the highway where the National Trails Highway crossed I-40 (Blankenbaker was driving 65 to 70 miles per hour), Blankenbaker saw a revolving yellow light, and traffic ahead was slowing down. Blankenbaker saw brake lights ahead and flashers on a tractor-trailer that he had been following. He took his foot off the gas pedal and coasted.

Suddenly a mixture of wind, sand, and dust moved onto the highway from the right-hand side of the road and enveloped the tractor-trailer and their vehicle.

Blankenbaker could not see past his windshield. Ed indicated that it was a complete brownout in the front and back windows. Blankenbaker tapped on his brakes several

¹¹ The second accident occurred about eight minutes after the tour bus left the site of the first accident.

times in an effort to warn motorists behind him. Seconds later, Ingram rear-ended Blankenbaker. Blankenbaker then blacked out. Denise said the dust storm and accident happened within four seconds. Ed estimated that there were three to five seconds after the dust went up until impact.

Ingram was driving on cruise control about 65 miles per hour (the speed limit was 70 miles per hour), talking, laughing, and listening to music with her friend, Jarrett. They were driving back to their home in Oklahoma. The weather was clear when they stopped in Barstow for food and gas. Ingram saw the tractor-trailer in front of her and then it disappeared when a dust storm came up, and she could not see in front of the windshield. She never saw Blankenbaker's car. Jarrett never saw Blankenbaker's car and described the dust storm as a white cloud. Ingram did not see any amber lights or brake lights. When the dust blew up suddenly and the tractor-trailer lights disappeared, Ingram tapped her brakes to stop the cruise control. She asked Jarrett if she could get over, but Jarrett could not see anything. Ingram took no other evasive action. Ingram slowed down as much as she could. Impact with Blankenbaker's car was three to five seconds later.

Officer Higgins saw flashing lights. Officer Higgins told Officer Mann that something had happened up the road and that he was going to check it out.¹² Officer Higgins then ran toward the second accident. As Officer Higgins was assessing the scene, Sergeant Schroeder arrived.

¹² Officer Mann testified differently in a prior proceeding.

Norma and Denise had to be cut out of their vehicle. Norma died at the scene. Denise was severely injured, requiring five surgeries, and her scalp had come off of her skull. She was in a wheelchair for six months. Ed suffered lacerations to his face and head, a broken shoulder, and a neck injury. Blankenbaker was also injured, as will be discussed in more detail, *post*. Jarrett needed her knee replaced. Ingram had injuries to her face and lost four or five teeth.

The conditions at the second accident were the same as or worse than the first accident. Visibility on National Trails Highway was the same as on I-40 that night.

Testimony was presented that Ingram had left Oklahoma with Jarrett on the morning of April 2, 1997. They stayed the night in her car and got six hours of sleep. They drove to San Diego the next day. They again stayed in her car that night. They then got up and took a shuttle to Tijuana, Mexico, to go shopping. They were out of money so they decided to head back home. They took I-15 from San Diego to I-40, intending to drive back to Oklahoma. Ingram would have stayed in Barstow if she had seen any warnings regarding winds.

Ingram's deposition testimony was read to the jury in which she claimed that one-half mile from the accident there was no problem with visibility. She only put her foot on the brake because the truck in front of her disappeared, and the accident happened seconds later. Ingram admitted she saw hazard lights on the truck and took her foot off the gas. She claimed she was going 65 or 70 miles per hour.

CHP Officer Michael Harris was assigned to investigate the accident. He interviewed Ingram at the hospital. Ingram told him that prior to the accident, she had been driving between 70 and 75 miles per hour and observed flashing lights in front of her. Officer Harris spoke with Ingram about one week later. She insisted she was going only 65 miles per hour. She claimed to have seen the flashing lights or brakes on Blankenbaker's car. She tried to brake to avoid the collision.

The State was responsible for monitoring highways, including problems with wind and visibility. All CHP officers had authority to close highways, provided a condition created "a menace" to motorists.

Sergeant Schroeder stated that in the area where the accident occurred, the winds would sometimes cause dust storms; other times it did not. On several occasions he had seen dust blowing around Daggett Airport, but I-40 was clear. Sergeant Schroeder admitted that he did receive some NWS warnings regarding the wind that day.

Officer Mann felt that if a driver had used due care, the wind conditions would not have caused a risk of injury to motorists. Springer would have put fire trucks on the freeway before the dust storm to stop traffic if CHP asked, but normally they do not assist with traffic control.

D. *Expert Testimony*

Dr. Arthur Ginsburg, a vision expert, surmised that Blankenbaker's car would have blended into the tractor-trailer. A video simulation of the accident was shown to the jury that depicted how the car would seem to disappear. He believed that Ingram would

not have seen the flashing lights on the bottom of the tractor-trailer. Dr. Ginsburg indicated that, if alerted to danger on a highway, it takes a person one and one-half seconds to respond.

Dr. Julie Laity was a specialist in geomorphology, which is the study of earth surfaces, wind-related activity, and erosion, especially for the Mojave Desert. Dr. Laity indicated that it would be foreseeable that wind would blow across I-40 from the dry lake beds that surround the freeway. On the night of the accident, the wind changed direction about 7:00 p.m. and began blowing across I-40. There would not have been as much dust on I-40 before the wind changed. Dr. Laity admitted that even if there was dust blowing at the Daggett Airport, it cannot be said with certainty that it was also blowing on I-40.

Dr. Timothy Ross was a geology expert. He surmised that conditions in the area where the accident occurred would make it difficult to foresee which way the wind would be blowing at any given time and whether materials in the area would be picked up by the wind. He also indicated that the wind shifted and started blowing over I-40 about 7:00 p.m. Based on numerous factors, there could be a dust storm at Daggett Airport but not in Newberry Springs.

Thomas Ganz was a police expert who worked for the CHP for 22 years. In his opinion, Sergeant Schroeder should have notified all officers in the field regarding the wind conditions. Moreover, Ganz felt the winds and dust created a dangerous condition and that Officers Higgins and Mann should have closed the highway at the time of the bus accident. It would have been appropriate for Officers Higgins and Mann to utilize

fire personnel to assist in the closure. It was his opinion that the officers could have easily gotten to a position before the dust storm on eastbound I-40 and stopped traffic prior to the Blankenbaker accident. Officer Ganz agreed that if Officer Montez had driven I-40 and it was clear, there would be no need for warning signs earlier in the day.

Dean Reichenberg was also a police expert. He was a current sergeant with the CHP. The CHP did not confirm the hazard on I-40 until Officers Higgins and Mann went to the bus accident. Reichenberg surmised that it was appropriate for them to have waited at the scene of the first accident to avoid any other collisions at the site and wait for back-up units rather than stop traffic on their own. There was no reason to request a warning sign for the winds or dust earlier in the day because they were not aware of any specific hazard on I-40. Also, Officers Higgins and Mann did not have the resources to close the freeway prior to the second accident.

Officer Higgins knew that cars were still going past him safely and that Sergeant Schroeder was on his way. Reichenberg estimated it would have taken about 31 minutes to slow traffic on eastbound I-40, which would have been after the accident occurred.

Jack Akers worked for Caltrans and with the CHP in providing changeable message signs to warn of freeway closures or hazardous conditions. A sign warning of road conditions could have been brought to the scene of the accident in 30 minutes and would have cost about \$202. However, he admitted he was called at 11:15 p.m. to set up a sign after the second accident, and it took him 90 minutes.

Dr. Mark Sanders was a human factors expert. He believed that temporary changeable message signs were very effective for motorists. The signs were most effective within 5 to 10 miles of an occurrence, but after about 20 miles a motorist would probably forget the warning.

Robert Crommelin, a traffic engineer, had reviewed numerous documents pertaining to the area where the accident occurred and the accident itself. Crommelin felt that the dust storm constituted a dangerous condition. The stretch of I-40 going east from Barstow was a “trap” for motorists, as there had been numerous accidents in the area due to dust storms -- 13 since 1994. In addition, even when using care, a motorist will have a hard time reacting to unexpected dust storms. Crommelin felt the CHP had notice of the condition at the latest at 4:45 p.m. The CHP should have coordinated with Caltrans and posted a warning sign at the junction of I-15 and I-40, which is 19 miles before the crash site. Crommelin believed the CHP should have closed I-40 and diverted traffic to National Trails Highway prior to the accident. Crommelin surmised that even with due care, the condition of dust at night could cause serious injury. This dangerous condition was a substantial factor in causing the Blankenbaker accident.

Joseph Thompson, a former CHP supervisor, felt that Officers Mann and Higgins should have closed I-40 and diverted traffic to the National Trails Highway. However, he admitted he did not know if wind on the National Trails Highway was less severe. He estimated it would have taken about 13 to 22 minutes to close down I-40.

Dr. Anthony Stein testified on behalf of the State as a human factors expert. He studies how people interact with their environment, taking into consideration their perceptual, physiological, and psychological capabilities. He believed that, based on the evidence in this case, the accident was likely caused by Ingram's inattention due to fatigue. Ingram had been driving 24 hours in two days and had only had six hours of sleep a night in her car, which set her up for fatigue. Blankenbaker had observed many things prior to the accident, including big rigs with their flashers, and this information was also available to Ingram, but she did not respond. Dr. Stein believed Ingram had 40 seconds to process this information and react.

James Harris was an expert on matters related to visibility and human vision. Harris felt that the dust storm obscured Ingram's vision, and she would have seen the taillights ahead of her only at the time of impact. Harris concluded that the cause of the accident was the sudden dust storm and not inattention on the part of Ingram.

Several experts on accident reconstruction testified. Two of them estimated that Ingram was traveling between 60 and 65 miles per hour and Blankenbaker's car was going three to five miles per hour at the time of the accident. Ingram would have come to a complete stop in 3.7 seconds. Between the dust storm and the impact, she had three to five seconds in which to react. A third expert disputed these findings. This expert believed that, despite Ingram saying otherwise, she tried to swerve prior to the accident; she was traveling 60 miles per hour at impact; Blankenbaker was going two miles per hour; and the dust storm caused the accident.

E. *Damages*

The parties stipulated that Blankenbaker had \$8,500 in funeral bills and \$4,200 in medical bills. Denise had medical bills of \$100,601, and Ed had medical bills of \$13,836 and \$25,000 for medications. As to future medical bills, the parties only agreed that if they were awarded a reasonable amount, it would be \$66,000 to Denise for scar reduction surgery and \$15,000 for removal of the rod in her leg, and \$69,000 to Ed for future neck surgery. The parties also stipulated that Ingram had \$7,000 in medical bills, and Jarrett had \$18,000. They also stipulated to reasonable amounts for future expenses.

III

THE BLANKENBAKERS AND SHIPLEYS CANNOT RAISE THE ISSUES IN
ARGUMENTS I AND II OF THE OPENING BRIEF

In their opening brief, the Blankenbakers and Shipleys raise three issues. The first issue involves the misconduct of the State's attorney during closing argument, and the second issue involves trial court error in allowing the State to have two closing arguments, including the last argument to the jury. Although not addressed by any party on appeal, we do not believe that the Blankenbakers and Shipleys can raise these issues on appeal, as they were the prevailing party against Ingram, who was found to be 100 percent liable for the wrongful death of Norma and their injuries, and they have failed to establish how they were aggrieved by the jury's failure to find liability on behalf of the State.

An “aggrieved party” for purposes of Code of Civil Procedure section 902 is one whose “interest is injuriously affected by the judgment.” (*In re Joel H.* (1993) 19 Cal.App.4th 1185, 1196.) To be sufficiently aggrieved by the judgment or order, the appealing party’s rights or interests must be injuriously affected in an “immediate, pecuniary, and substantial” way, as opposed to being a “nominal or a remote consequence” of the judgment or order. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736-737.)

The Blankenbakers and Shipleys state in their opening brief that the misconduct of the State’s attorney and the “failure to allow plaintiffs to have the last argument in this matter” was clearly prejudicial and that, in this close case, the State would have been found liable. However, the jury found Ingram 100 percent liable and both the Blankenbakers and Shipleys received a substantial judgment against her. They do not assert how they were aggrieved by the jury finding that the State had no liability. The Blankenbakers and Shipleys can speculate that if the jury had found the State liable, they would have received a higher verdict. However, this is simply speculative -- a “nominal or a remote consequence” of the judgment or order. (*County of Alameda v. Carleson, supra*, 5 Cal.3d at pp. 736-737.) We don’t know if they would have received a different or more advantageous judgment had the State been found liable.

Further, they have completely failed to explicate how these alleged errors affected the verdict against *Ingram*. “A party is not aggrieved by a judgment or order rendered in its favor. [Citation.]” (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 211.)

Hence, we conclude that the Blankenbakers and Shipleys have no standing to raise the first two issues in the opening brief on appeal, as they have failed to establish that they are aggrieved parties as required by Code of Civil Procedure section 902. As such, we need not address these issues.¹³ Since the third issue raised (Blankenbaker was entitled to pain and suffering damages) attacks the judgment against Ingram, we will address it, *post*.

IV

INCONSISTENT VERDICT BY FINDING THAT THE STATE DID NOT HAVE ADEQUATE NOTICE TO TAKE MEASURES TO PROTECT AGAINST THE DANGEROUS CONDITION

Ingram appears to claim that the jury's verdict was inconsistent with the evidence presented at trial because substantial evidence was presented that the State had notice of the dangerous condition on I-40. Essentially, Ingram argues the jury disregarded evidence that strongly supported notice, and therefore, the verdict was inconsistent with a finding that she was negligent. This argument was also raised in her motion for new trial, which was denied by the trial court.

The denial of a motion for new trial is not an appealable order, but it may be reviewed on appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19; *Dominguez v. Pantalone* (1989) 212

¹³ Ingram additionally argues that the State's attorney committed misconduct during closing argument, which we will address, *post*.

Cal.App.3d 201, 215.) An order denying a motion for new trial “will not be disturbed on appeal unless it is manifest that said ruling was an abuse of discretion [citation].” (*Locksley v. Ungureanu* (1986) 178 Cal.App.3d 457, 463; see also *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160-1161.) Moreover, “[i]t is a fundamental rule of appellate review that the judgment appealed from is presumed correct and ““all intendments and presumptions are indulged in favor of its correctness.”” [Citation.]” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

This case was clearly decided based on the jury’s determination of the credibility of the witnesses, not due to a confusing or inconsistent verdict as argued by Ingram. The jury was presented with conflicting evidence on notice, as outlined in detail, *ante*. Many of the experts called by the Blankenbakers surmised that the State had adequate notice of the dangerous condition based on the report from Daggett Airport of visibility problems at 3:00 p.m. and the NWS bulletin issued at 4:45 p.m. reporting wind-blown dust in I-15 corridor and that Officers Higgins and Mann had time to close eastbound I-40 lanes prior to the instant accident.

However, other evidence was also presented that refuted notice. The State brought forth evidence that the road was clear at 4:00 p.m.; that the warnings prior to 7:00 p.m. all stated there was wind, but not dust, in the area; the dust did not start blowing across I-40 until 7:00 p.m.; and by the time Officers Higgins and Mann arrived at I-40, there was not enough time to close the highway prior to the instant accident. The jury and the trial court heard the witnesses testify and heard counsel’s arguments. The trial court

determined that the jury properly concluded that the State did not have adequate notice of the dangerous condition in order to take measures to alleviate the risk. This was not inconsistent with the evidence presented. It was their obligation to make that determination, and we do not reweigh the evidence to decide if we would have reached a different conclusion.¹⁴ Hence, the trial court did not abuse its discretion by denying Ingram's motion for new trial on this ground.¹⁵

V

IMPROPER ARGUMENT BY THE STATE'S COUNSEL DURING CLOSING ARGUMENT

Ingram contends that the State's attorney committed misconduct during closing argument, requiring reversal of the judgment, by arguing that if the jury found liability on behalf of the State, it would be the taxpayers who would foot the bill for the award of damages.

A. *Additional Factual Background*

During closing argument, the State argued that the Blankenbakers and Shipleys had joined together with Ingram to fight the State. Counsel for the State argued: "In fact, their expert -- and I think this is especially true of Dr. Ginsburg -- have done everything

¹⁴ Ingram also appears to claim that the improper argument by the State's counsel caused the jury to disregard the notice evidence. We will address the prejudice of argument by the State's counsel, *post*.

¹⁵ Although the State has argued there was sufficient evidence to support the jury's verdict as to Ingram being negligent, we do not believe that Ingram raises this issue.

to explain away any negligence by Janet Ingram. They are really only pretending to sue Janet Ingram, and I submit to you, that that's because they're looking for a substantial award of damages and they want those damages from the State of California and it's tax payers who pay." Counsel for the Blankenbakers immediately objected on grounds of improper argument. The trial court responded: "Objection's overruled." The State left the subject and again argued that Ingram caused the accident.

Ingram's motion for new trial raised the issue that this was improper argument. The trial court denied the motion for new trial, finding: "It is apparent to anyone who participated in this case and anyone who will review this case that this was a very long and complicated case. Very interesting and very tragic, no other way to describe it. [¶] And the Court is persuaded that errors occurred during the course of the trial. Specifically, there was the reference made by the State to taxpayers having to pay. The Court reviewed that specifically along with others, and determined that [counsel for the State]'s argument in that area was very brief. She did not repeat it. She did not emphasize it. [¶] The Court finds that this is harmless error and finds that there is not a reasonable chance of a different verdict from that very slight reference to taxpayers' payment."

The trial court then concluded that all counsel did outstanding jobs but noted that in watching State's counsel "present the State's side of the case, found quite a contrast between the very workmanlike, low key presentation of evidence, as compared to her argument. Her argument, she came to life. She was vigorous and persuasive in her

emphasis in presentation. She, I think, was very persuasive in presenting the State's view in this case. And I'm sure that had some effect."

The trial court denied all of the motions for new trial, concluding: "I think that covers it somewhat superficially given the great variety of issues, but as I've said, the Court has reviewed it and has given thought to the issues raised in your moving papers and responsive papers and your comments today. That is the Court's ruling."

B. *Analysis*

Normally, in order to "'preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must be lodged at trial.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794 (*Cassim*)).¹⁶ In addition, counsel must move for a mistrial or curative admonition or the issue will be forfeited on appeal. (*Ibid.*; see also *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 468.) However, the Supreme Court has found an exception to the admonition request if "'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

¹⁶ Counsel for Ingram, Scott B. Spriggs, has submitted a declaration in which he claims that he made an objection to the argument although it was not shown on the reporter's transcript because he claims that he made it at the same time as the Blankenbakers' counsel. We have no reason to doubt Spriggs's representation and find that he objected on Ingram's behalf.

Here, the trial court immediately overruled the objection to the comment made by the State's counsel. There was no time to request an admonition. The timely objection was enough to preserve the issue for appeal.

As previously stated, a trial judge is afforded wide discretion in ruling on a motion for new trial and exercise of that discretion is afforded great deference on appeal.

(*Sherman v. Kinetic Concepts, Inc.*, *supra*, 67 Cal.App.4th at pp. 1160-1161.) However, the deferential abuse of discretion standard of review does not apply to the question regarding prejudice. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.) In *Decker*, the California Supreme Court stated that appellate courts are required to review the entire record, including the evidence, and independently determine whether prejudice resulted from the misconduct. (*Ibid.*) Prejudice exists if it is reasonably probable that the jury would have arrived at a verdict more favorable to the moving party in the absence of the irregularity or error. (*Ibid.*; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.)

“An attorney's appeal in closing argument to the jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality. [Citation.]” (*Cassim, supra*, 33 Cal.4th at p. 796.)

In *People ex rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525, a case involving eminent domain, the Court of Appeal concluded the attorney committed misconduct in closing argument by advising the jury that in viewing the question of just compensation to the land owner, it should consider it their own money, which the

appellate court interpreted to be urging each juror to view the case from a “personal point of view as a taxpayer.” (*Id.* at p. 533.)

We agree with the trial court that counsel for the State committed misconduct in mentioning that taxpayers would pay the cost of the judgment if the verdict was against the State. Hence, we review the misconduct, taking into account the “evidence adduced, the instructions delivered to the jury” and the entire argument of counsel, to determine “whether it is reasonably probably” that Ingram would have received a better result without the argument. (*Cassim, supra*, 33 Cal.4th at p. 802.)

Our own independent review of the record shows that absent such misconduct, the verdict would have been the same. As set forth, *ante*, the jury could reasonably conclude that the State did not have adequate notice of the conditions on I-40 in time to warn motorists. The jury was also presented with persuasive evidence that Ingram was negligent. She had been driving for 24 hours in the prior three days with inadequate sleep. They could find that her lack of sleep and failure to see the cars in front of her were substantial causes of the accident. This was further evidenced by the fact that Blankenbaker was able to see the brake lights and other warnings ahead of him and stop in plenty of time. Moreover, over 200 cars had driven through the dust storm with no adverse consequences.

Additionally, the comment was brief in a long trial. The State’s attorney never repeated the statement and only implied that taxpayers would foot the bill for the judgment; she never made the link that the jury in this case were those taxpayers who

would be responsible for the payment. It did not become an issue in the trial. As held in *Cassim*, a brief statement made during a long trial is not necessarily prejudicial. (*Cassim*, *supra*, 33 Cal.4th at p. 803.) This case is unlike the case cited by Ingram -- *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 177-179 -- where counsel made an extensive argument, including after objection, regarding taxpayers having to pay for damages.

Finally, the instructions admonished the jurors that any statements made by the attorneys were not evidence. (Judicial Council of Cal. Civ. Jury Instns., CACI No. 5002.) We must presume that the jurors adhered to the instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

As an aside, we do not find the fact that the jury deliberated for 13 days shows that the case was close and this argument was prejudicial to Ingram. The jury foreperson advised the trial court after one week of deliberations that they were taking their time and not rushing since it was an important case. Further, after one week, one of the jurors became ill and was removed. The jury was instructed that it must start deliberations anew, and the jury foreperson advised the trial court that they were going through the same meticulous process of reviewing the evidence as they did before the new juror was impaneled. We cannot say in this case that the length of deliberations can be viewed as the jurors having a difficult time in a close case.

Based on our independent review of the record, we conclude that the brief comments made by the State's counsel were not prejudicial and that the results of the

instant case would have been the same had such comments not been made. Any error was harmless.

VI

CALTRANS'S LIABILITY

Ingram further contends that during closing argument the State improperly mentioned Caltrans's liability for not putting up warning signs even though it had been granted summary judgment prior to trial and dismissed from the case.¹⁷

A. *Additional Factual Background*

During cross-examination, Crommelin testified that the CHP would be the entity to notify Caltrans about problems on the freeway and instruct Caltrans to set up signs. Crommelin was then asked whether he had previously given the opinion that the decision to put out the warning sign was really a Caltrans decision. Crommelin responded that he believed it was up to the CHP to contact Caltrans to put up the signs. The State then asked Crommelin to refer to a declaration that he signed in the instant case prior to trial. Crommelin began to read from the declaration, but counsel for Ingram and Jarrett objected. After excusing the jury, counsel for Ingram argued that the declaration discussed what actions should have been taken by Caltrans, and that Caltrans had been

¹⁷ The State appears to misinterpret Ingram's argument to be that the trial court improperly allowed Crommelin to be impeached with information regarding Caltrans's responsibility for putting up signs. However, we do not interpret Ingram's brief as raising that as an issue. Rather, Ingram's claim is that the State's attorney committed misconduct during closing argument when he mentioned that Caltrans had responsibility for placing road signs on the highway.

out of the case as a result of a motion for summary judgment, so their negligence was not an issue in the case. The declaration was prepared in opposition to the motion for summary judgment brought by Caltrans. The trial court overruled the objection.

The issue was revisited the following day. The State indicated that the only use of the declaration was to impeach Crommelin's testimony that it was the CHP who was responsible for deciding to put up warning signs, when he previously placed the burden on Caltrans. The trial court felt that the use of the declaration was proper impeachment.

Crommelin then read his prior declaration to the jury in which he stated that he believed Caltrans was responsible for contacting the CHP and taking additional steps to determine the conditions on I-40 based on the Daggett Airport visibility problems and after the NWS bulletin. Caltrans had the responsibility to call for a portable changeable message sign to warn of blowing dust. The failure to put up warning signs was a proximate cause of the accident. During the State's closing argument, it addressed whether there was notice in order to put up warning signs. The State argued that the NWS bulletins were available to the public. The State explained that these advisories were in the CHP's management information system, or "MIS." The State then argued: "MIS is available to Caltrans. You heard some terms to that effect from Vicky Graham. So Caltrans can access that and see what the CHP's knowledge is about what's going on on the road and take action accordingly. And Mr. Ganz told you just last week that it is the responsibility of Caltrans, not the CHP, to sign the roads. So Caltrans has access to other bulletins just like this one." There was no objection.

Ingram raised in her motion for new trial that the State improperly argued that Caltrans had liability for not putting up warning signs. The motion for new trial was denied, without a specific statement as to whether there was misconduct.

B. *Analysis*

Ingram made no objection to the State's argument regarding Caltrans having the responsibility to put up warning signs. Ingram's failure to object and request a curative admonition waived the issue on appeal. (*Cassim*, 33 Cal.4th at pp. 794-795.) Moreover, the statements were not so egregious or persistent to support that an admonition would have been ineffective or the effect of the misconduct incurable. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) The jury could have been advised immediately that they were not to consider if Caltrans had any responsibility for putting up warning signs. No such admonition was requested, and Ingram has not argued that a request for such admonition would have been futile. We therefore conclude that Ingram's failure to object and request an admonition precludes consideration of the issue on appeal.

VII

INCONSISTENT FINDINGS ON THE SPECIAL VERDICT FORM

Although it is not entirely clear, Ingram appears to contend that the special verdict form given to the jury created confusion on behalf of the jury regarding causation and the burden of proof and that the resulting verdict was inconsistent. She makes other

arguments essentially arguing that the findings of the jury on the special verdict form were inconsistent.

This issue was raised in Ingram’s motion for new trial and rejected by the trial court. The trial court “has the responsibility to interpret the verdict ““from its language considered in connection with the pleadings, evidence and instructions.”” [Citation.]” (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 729.) Further, as previously stated, we presume that the judgment is supported by the record, and error must be affirmatively shown. (*Benach v. County of Los Angeles, supra*, 149 Cal.App.4th at p. 852.)

First, Ingram appears to argue that question 8 on the verdict form (“Was the failure of the State of California to provide a warning sign, signal, marking, or device a substantial factor in causing plaintiff’s injuries?”) conflicted with the burden of proof on question 11 (“Was the negligence of Janet Ingram a cause of injury to any plaintiff?”). The State responds that the issue is moot because the jury, by finding that the State did not have adequate notice, was not required to answer. We agree with the State that the jury was not required to answer question 8 once it determined that the State did not have adequate notice. The jury only needed to reach the question if it found that the State had notice in time to put up such a warning sign. Hence, the jury did not even consider question 8 since it rejected notice, and therefore the issue of its conflict with question 11 is moot. (See *Bossi v. State of California* (1981) 119 Cal.App.3d 313, 321 [issue moot because jury did not consider the question in reaching its verdict].)

Ingram's other argument appears to be that since the jury found that a dangerous condition existed at the time of the incident, i.e., the dust storm, and that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was suffered here, it could not also find Ingram 100 percent liable for the plaintiffs' injuries on a negligence theory.

The liability of a public entity for injury caused by a dangerous condition of its property is defined in section 835 of the Government Code, which provides, in its entirety: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (See also *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68.)

Negligence was defined for the jury as: "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that

a reasonably careful person would do in the same situation. [¶] You must decide how a reasonably careful person would have acted in Janet Ingram's situation." (CACI No. 401.) The jury was also instructed on the basic standard of care that "[a] person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They must also control the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence." (CACI No. 700.) The jury was further instructed that if they found Ingram was not driving at a reasonable speed, she was negligent. (CACI No. 706.) The jury was further instructed on negligence that they had to find Ingram was negligent, that the plaintiffs were harmed, and that her negligence was a substantial factor in causing the harm. (CACI No. 400.)

The jury was instructed about assigning responsibility to each party as follows: "More than one person's negligence or fault, including plaintiffs', may have been a substantial factor in causing plaintiffs' harm." (CACI No. 406.) The jury was also instructed that there could be multiple causes for the accident, and "Janet K. Ingram and [the] State of California cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [plaintiffs'] harm." (CACI No. 431.) Finally, the jury was instructed that it must follow the instructions in answering the questions on the special verdict form. (CACI No. 5012.)

Here, based on the instructions and the special verdict form, the jury could conclude that a dangerous condition, i.e., the dust storm, existed at the time of the accident, and this was a substantial factor in causing reasonably foreseeable injuries to

plaintiffs. However, the jury could not find the State liable for plaintiffs' injuries if it concluded it did not have adequate notice of the dangerous condition in order to take measures to protect against injury. Thus, it was not inconsistent for the jury to find Ingram 100 percent liable on a theory of negligence, when the jury concluded that the dust storm was a substantial factor in causing injuries to the Blankenbakers and Shipleys.

The jury could reasonably find that Ingram, despite these dangerous conditions, acted negligently by driving too fast for the conditions at the time. It could reasonably conclude that she was driving too fast or was not using reasonable care in driving for the conditions and that her speed caused the injuries to the Blankenbakers and Shipleys and the death of Norma.

Ingram points to the fact that the jury concluded that the State did not have notice of the dangerous condition, but she was charged with that knowledge in exercising reasonable care in driving. However, the notice required for the State was notice that gave it time to take measures to try to prevent injury. The notice for Ingram was almost instantaneous. The jury needed only determine whether she exercised reasonable care in coming upon the slowing cars and sudden dust storm. Such finding was not inconsistent.

Ingram contends the jury verdict cannot be reconciled with the fact that the jury, on the special verdict form, awarded her and Jarrett damages, when she was found 100 percent liable and Jarrett did not sue her. She claims this award shows the jury actually found the State had liability for the accident. However, Ingram completely ignores the language in the special verdict form. Before assessing damages for Ingram, the jury was

advised: “Without taking into consideration the reduction of damages due to the negligence of Janet Ingram, if any, what do you find to be the total amount of damages” Hence, the jury could reasonably conclude that they had to determine damages regardless of who was at fault.

As for the damages award for Jarrett, the jury could reasonably conclude that Jarrett was entitled to damages for her injuries since she was not at fault. The jury cannot be expected to be aware of the nuance of the law that she had not actually sued Ingram for her injuries.

We reject that the special verdict was inconsistent.

VIII

EXCLUSION OF TESTIMONY BY EXPERT JAMES HARRIS

Ingram contends the trial court erroneously excluded testimony regarding visual cues and memory by her expert, James Harris.

A. *Additional Factual Background*

Harris testified that he had a bachelor of science degree in electrical engineering. He had worked 25 years on vision-related matters. He had no psychology or neurology background. He had worked on visibility-related matters on this case.

After Harris testified regarding how witnesses sometimes cannot accurately gauge the level of darkness, Ingram’s counsel inquired: “Is this variability in witness testimony also true regarding time intervals involved in accidents?” Harris testified, “Yes, it is.”

The State then objected that this was beyond his expertise, and Ingram's counsel responded that it went to perception of the accident. The State's objection was sustained.

Ingram's counsel then inquired if part of his visibility study included how people respond to visual stimulation and the time it takes to respond to stimulus. When he responded yes, Ingram's counsel again asked if he had an opinion as to time estimates given by witnesses regarding specific events. The State again objected as being beyond his expertise. The trial court informed Ingram's counsel that he needed to "narrow it to his expertise." Ingram's counsel again asked if he had expertise in studying people's responses to some type of visual stimulus, and he responded yes. Ingram then asked: "Okay. And part of this is, as part of your research and study, have you come to understand that eyewitnesses have a different opinion on time viewing the same events?" When the State's objection was again sustained, Ingram's counsel asked for a sidebar conference.

Ingram's counsel argued this was the same testimony as that given by Dr. Stein. Harris testified he was knowledgeable in the area. The State argued that Harris was an electrical engineer designated to testify in vision and visibility. He had no background in psychology or issues of memory. Issues of memory were very different from issues of vision. The trial court responded that it appeared Harris had expertise in vision but agreed with the State that he had no memory expertise.

Harris then informed the trial court that he belonged to several science societies where he was advised of various memory studies.

The trial court ruled: “I think it’s inadequate to deal with memory. The Court’s ruling stands.” Ingram raised the issue in her motion for new trial and it was denied.

B. *Analysis*

“The receipt or refusal of expert testimony is largely within the discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing of abuse. [Citations.]” (*Wilson v. Foley* (1957) 149 Cal.App.2d 726, 735.) “It is well settled that an expert’s qualifications must be established with respect to the subject matter of his testimony. The fact that the purported expert may be qualified in one field vaguely related to another does not mean that he is qualified in that other field. [Citation.]” (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 66-67.)

We cannot conclude, based on the evidence before us, that the trial court abused its discretion by excluding any testimony by Harris as to memory. Harris had expertise in vision issues and was called to testify on such matters, but there was no showing that he was aware of how a person remembers time intervals as inquired by Ingram. Although Dr. Stein was allowed to testify as to time intervals (he had expertise in psychological issues), there was no objection by Ingram, and its admission has no bearing on the fact that Harris was not qualified to so testify.

We also do not see how it prejudiced the verdict against Ingram. Ingram only contends that the State’s expert, Dr. Stein, was allowed to testify regarding time intervals and the reaction time. However, the issue here was whether the State had notice of the dangerous condition in time to remedy it, or whether Ingram was driving negligently

because she was fatigued and did not recognize the same visual cues as Blankenbaker. We fail to see how any additional testimony as to how a person remembers time intervals would have impacted the verdict.

IX

ADDITIONAL NONECONOMIC DAMAGES FOR BLANKENBAKER

Blankenbaker contends that the jury inconsistently and improperly failed to award him noneconomic damages for pain and suffering, despite awarding him economic damages in the amount of \$4,200 for his medical expenses. He contends the jury was under the misimpression that he was an executive for an insurance company and therefore did not believe he needed the award. Blankenbaker asks this court to order additur to the judgment in an amount between \$100,000 to \$250,000 or grant a new trial on damages.

A. *Additional Factual Background*

During trial, evidence was presented that Blankenbaker had been a senior executive at an insurance company. Blankenbaker testified that due to the accident he had a laceration to the back of his head that had to be stapled back together and a low back injury that caused “excruciating pain” at the time of the accident. He also had a quarter-size laceration on his ankle that had to be stitched up. He was given pain relievers and received no physical therapy. Blankenbaker was able to return to work a week after the accident. Blankenbaker was transported by ambulance and treated at

Barstow Community Hospital. He had medical expenses in the amount of \$4,200. There was no medical testimony as to his injuries.

During closing argument, the Blankenbakers' counsel argued to the jury the amount of damages to be awarded. He argued that the Blankenbaker family should be awarded \$6 million for the loss of Norma. The Blankenbakers' counsel suggested that Blankenbaker was entitled to \$275,000 in pain and suffering for his injuries separate from the wrongful death damages.

The Blankenbaker family was awarded \$1,292,128 in economic and noneconomic damages for the wrongful death of Norma. As for Blankenbaker, the jury awarded him \$4,200 for his medical expenses but nothing for pain and suffering.¹⁸

At the time of the motion for new trial, Blankenbaker asked, as part of his request for additur, that he be awarded general damages for emotional distress and pain and suffering due to the accident. The trial court concluded there was no clear error on the determination of damages.

B. *Analysis*

The amount of damages to be awarded is a question of fact for the jury. (*Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558.) If a motion for new trial is denied, the adequacy of the jury's award is within the discretion of the trial court. (*Ibid.*) “Whether the contention is that the damages fixed by the jury are too high or too low,

¹⁸ The jury was instructed on pain and suffering damages and were told that it was up to them to decide the appropriate of amount damages. (CACI No. 3905A.)

the determination of that question rests largely in the discretion of the trial judge. The appellate court has not seen or heard the witnesses, and has no power to pass upon their credibility. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered.” (Id. at pp. 558-559.) Even where there is liability, an award of no damages does not necessarily represent error if the jury reasonably could have concluded the plaintiff’s injuries were insubstantial. (*Delia S. v. Torres* (1982) 134 Cal.App.3d 471, 485, disapproved on another point in *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 905, fn. 28.)

The Blankenbakers argue that the damages were inadequate as a matter of law, relying upon *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 936 (*Dodson*). In *Dodson*, despite awarding medical expenses to the plaintiff, the jury awarded no pain and suffering damages. (Id. at p. 935.) The jury found that the defendant in that case was negligent and that the negligence caused Dodson’s injuries. The trial court denied a motion for new trial on the inadequacy of damages. (*Ibid.*) However, on appeal, the court concluded that the pain and suffering damages award was inadequate as a matter of law because “Dodson was hospitalized, underwent a serious surgery under general anesthesia, received physical therapy, used a walker for some time after the surgery, and so on. Where a plaintiff undergoes a serious surgical procedure which a jury’s special

verdict attributes to an accident caused in part by the negligence of the defendant, the plaintiff must necessarily have endured at least some pain and suffering, and a damage award concluding otherwise is therefore inadequate as a matter of law. As *Miller [v. San Diego Gas & Elec. Co., supra, 212 Cal.App.2d 555]* stated, in cases where the right to recover is established, and there is also proof that the medical expenses were incurred because of the defendant's negligent act, '[i]t is of course clear that in such situation a judgment for no more than the actual medical expenses occasioned by the tort would be inadequate.' [Citation.]" (*Id.* at p. 938; see also *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 585-586 [award insufficient where plaintiff sustained severe head injuries necessarily requiring surgery, but the trial judge awarded only \$88.63 in pain and suffering].)

Like *Dodson*, the jury found Ingram negligent and, by awarding Blankenbaker his medical expenses, found his injuries were caused by the accident. However, the present case lacks evidence concerning the extent of Blankenbaker's injuries and suffering. We believe this case is more akin to the finding in *Randles v. Lowry* (1970) 4 Cal.App.3d 68. In *Randles*, a child was injured when the car in which he was riding was rear-ended. The evidence established that the child suffered two cuts on his head from which he was bleeding. (*Id.* at p. 72.) A doctor testified that no stitches were required, and there were no bone injuries. (*Ibid.*) On appeal, the court held that the jury verdict awarding only special damages (the medical expenses incurred) was not inadequate as a matter of law. (*Id.* at pp. 73-74.) The appellate court explained: "In the instant case, the evidence

shows that [the child's] injuries consisted solely of two lacerations which did not need suturing, and only required two visits to his family doctor and a total doctor bill of \$10 (plus \$5.50 for . . . X-ray charges). There is no evidence that he suffered any discomfort after the date of the accident. . . . In light of this evidence, we cannot say that a judgment coinciding with the amount of medical expenses was inadequate as a matter of law.” (*Id.* at p. 73.)

Although Blankenbaker's injuries here were more serious than those received by the child in *Randles*, we cannot conclude that the failure to award damages for pain and suffering was inadequate as a matter of law. There was no dispute as to whether Ingram's negligence caused Blankenbaker's injuries, but the evidence only minimally established those injuries. Blankenbaker testified to his own back pain and staples to a laceration to his head, but there was no medical testimony as to the true extent of his injuries, how long he was in pain, what type of sutures were placed on his wounds, or any other evidence of suffering. Blankenbaker testified he was able to return to work the following week. The jury could reasonably conclude, based on the evidence before it, that no pain and suffering damages were necessary.¹⁹ Where, as here, the evidence of the pain and suffering is insubstantial, we may not interfere with a trial court's order denying a new trial on inadequate damages grounds.

¹⁹ Blankenbaker argues that he was not awarded pain and suffering damages because the jury was told he was an executive at an insurance company. Nothing in the record supports that the jury considered this testimony in assessing damages.

X

THE STATE’S MOTION FOR SANCTIONS FOR INGRAM FILING MOTION TO
DISMISS RESPONDENT’S BRIEF AS UNTIMELY

The State filed a motion for sanctions against Ingram and her counsel, Scott B. Spriggs, due to having to respond to a motion filed by Spriggs to strike the respondent’s brief. We reserved consideration of the motion for sanctions in conjunction with the instant appeal.

At oral argument, the parties informed this court that Spriggs had already paid the requested \$553 to the State after receiving this court’s tentative opinion, which found merit in the sanctions request. The motion is therefore moot.

XI

DISPOSITION

We affirm the judgment.

Ingram is entitled, as the prevailing party against the Blankenbakers, to her costs on appeal from the Blankenbakers. The State is entitled to its costs, to be paid jointly and severally by the Blankenbakers, the Shipleys, and Ingram.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI

Acting P.J.

We concur:

GAUT

J.

MILLER

J.